UPREME COURT, U. S.

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No. 700

IN THE

SUPREME COURT OF THE UNITED STATES

HOWARD HUNT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To Said Honorable Court:

Petitioner prays that a writ of certiorari issue to review the judgment in the above entitled and numbered case rendered by the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction of the offense of conspiring to impede narcotics informer Paul Leyva as a witness before a federal grand jury.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It appears in Appendix A. (Pages A1-A8 hereof).

JURISDICTION

The Court of Appeals rendered judgment of affirmance on August 19, 1968. (R. 1537). Copy thereof appears in Appendix B on page A9 hereof. Petition for rehearing (R. 1538) was denied October 8, 1968. (R. 1538). Copy of judgment of the Court of Appeals denying such petition appears in Appendix C on page A10 hereof.

The jurisdiction of this Court rests on 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether petitioner's conviction for the offense of conspiring to impede narcotics informer Paul Leyva as a witness before a federal grand jury is invalid under the Due Process Clause of the Fifth Amendment to the United States Constitution because of the total absence from the record of proof as to two essential elements of that offense, namely, the element that Leyva was such a witness at the time of the claimed conspiracy, and the element that at such time petitioner had knowledge that Leyva was such a witness.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are contained in the Due Process Clause of the Fifth Amendment to the United States Constitution and are as follows: "No person shall . . . be deprived of . . . liberty . . . without due process of law. . ."

STATEMENT

Petitioner was convicted of the offense of conspiring, in violation of 18 U.S.C. §371,[1] to commit, in violation of 18 U.S.C. §1503,[2] the crime of obstructing the administration of justice by impeding narcotics informer Paul Leyva as a witness in a proceeding involving Daniel Guerrero pending before a federal grand jury. Petitioner's sentence was imprisonment for two years. (R. 339).

The starting point for the events which led to this prosecution was a commissioner's court hearing held May 2, 1966 on a narcotics complaint against one Daniel Guerrero.

At the end of that hearing on the evening of that day the commissioner bound Daniel Guerrero over to the federal grand jury. (R. 1011, 1148).

On the afternoon of the next day petitioner,—who had been counsel for Daniel Guerrero in that hearing and who during that hearing had found out that Paul Leyva was an informer for the Government in the Daniel Guerrero case,—procured execution by Leyva of a sworn statement (R. 1175-1181) which detailed his working arrangements with federal narcotics agents and the truth of which has never at any time been challenged by the Government or anyone else.

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1. The provisions of that statute pertinent here are as follows: "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. The provisions of that statute pertinent here are as follows: "Whoever corruptly or by threats or force . . . endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any . . . grand . . . juror . . . shall be fined not more than $5,000 or imprisoned more than five years, or both."

The execution by Leyva of that statement occurred after he had intermittently, over a period of several hours, been subjected by some of the co-defendants to ill treatment producing the injuries shown by photos in evidence as Government's Exhibits Nos. 8-10. (R. 1118-21).

On these facts the jury returned a verdict finding the petitioner guilty. That verdict,—having responded to a charge which authorized the jury to convict on finding petitioner conspired with one or more of the co-defendants to impede Leyva as a witness in proceedings involving Daniel Guerrero commenced in the San Antonio Division of the United States District Court of Texas (R. 176-194), and having also responded to a record which showed that as of the time of the alleged commencement of the claimed conspiracy the only proceeding involving Daniel Guerrero which had been commenced in that Division was the proceeding involving Daniel Guerrero then pending before the federal grand jury by virtue of the commissioner having bound Daniel Guerrero over to the grand jury,[3]—impliedly found that petitioner conspired with one or more co-defendants to impede Leyva as a witness in a proceeding involving Daniel Guerrero pending before the federal grand jury.

Petitioner could not possibly have so conspired unless Leyva was a witness in a proceeding involving Daniel

3. The *only* proceeding involving Daniel Guerrero shown by the evidence to have been pending at time of the conduct on May 3, 1966, by petitioner claimed by the Government to show he conspired as alleged was the proceeding which came into existence before the federal grand jury by virtue of the commissioner having on the evening of May 2, 1966, bound Daniel Guerrero over to that grand jury. There is no proof that that grand jury ever indicted Daniel Guerrero and thereby caused to come into existence any proceeding involving him in a court of the United States.

Guerrero pending before the federal grand jury and unless petitioner knew that Leyva was such a witness.[4]

Thus, under the circumstances presented here the test whether there is proper evidentiary foundation for the jury's implied finding that petitioner did so conspire is whether the Government prima facie proved the essential element of its case claiming that Leyva was a witness in a proceeding involving Daniel Guerrero pending before the federal grand jury and also proved the essential element of its case claiming that petitioner knew that Leyva was such a witness.

The Government did not prima facie prove either of those essential elements.

As to the first of those elements, the view of the Court of Appeals was that Leyva expected to testify to the facts he had given the Government as an informer and that for that reason he had the status of witness. The trouble with that view is that it has no support in the evidence. Nowhere in the record will there be found any testimony showing or tending to show that the Government ever asked Leyva to testify in the proceeding involving Daniel Guerrero pending before the federal grand jury or any other proceeding as to any material facts he gave the Government, or that Leyva ever intended or expected to be a witness for the Government as to any of those facts in the

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4. One cannot conspire to bring about an unlawful result if he does not know facts which make that result unlawful. *Pettibone* v. *United States*, 148 U.S. 197 (1893); *Perkins on Criminal Law*, (Foundation Press, 1957) p. 545. *Cf. United States* v. *Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941), where the Court said:

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.

proceeding involving Daniel Guerrero pending before the grand jury or any other proceeding, or that Leyva ever told petitioner or anyone else that Leyva ever intended or expected to testify as to any of those facts in the proceeding involving Daniel Guerrero pending before the grand jury or any other proceeding.

The proof also failed as to the second of the aforementioned elements, i.e. the element involving the claim of the Government that petitioner knew Leyva was a witness in a proceeding involving Daniel Guerrero pending before the grand jury. There was no testimony by Leyva or anyone else showing or tending to show that Leyva ever told petitioner that Leyva expected or intended to be a witness in a proceeding involving Daniel Guerrero pending before the grand jury or any other proceeding or showing or tending to show that petitioner from any other source gained knowledge that Leyva expected or intended to be such a witness

REASONS FOR GRANTING THE WRIT

As shown in the preceding Statement, there are at least two essential elements of the offense charged against petitioner which have no support in the evidence.

That fact would make the conviction repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution if this had been a State prosecution. *Thompson* v. *Louisville,* 362 U.S. 199 (1960); *Johnson* v. *Florida,* 391 U.S. 596 (1968).

May the conviction stand consistently with that fact merely because this is a federal prosecution?

We submit that that question should be answered in the negative, our position being that the Due Process Clause of the Fifth Amendment to the United States Con-

stitution makes it proper for this Court to extend to federal prosecutions the constitutional rule laid down in *Thompson* and *Johnson*.

The question whether that rule applies in federal prosecutions is, so far as we have been able to discover, one of first impression in this Court.

Its importance is obvious and needs no demonstration. The issues it raises go to the very integrity of the trial itself. For surely in federal prosecutions, no less than in State prosecutions, no constitutional rule could be of more importance than one guaranteeing that an accused may not be convicted where there is total lack of proof as to any essential element of the offense with which he is charged.

Petitioner respectfully submits that this case affords an appropriate opportunity for this Court to make that rule apply in federal prosecutions and that that rule, applied here, will warrant invalidation of petitioner's conviction due to total absence of proof as to essential elements of the offense of which he has been convicted.

CONCLUSION

For the reasons given, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24601

HOWARD HUNT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(August 19, 1968)

Before JONES, WISDOM, and THORNBERRY, Circuit Judges.

WISDOM, Circuit Judge: Howard Hunt appeals from a judgment, entered on a jury verdict after trial, adjudging him guilty of violating 18 U.S.C.A. §1503 by conspiring to obstruct the administration of justice. Hunt was sentenced to imprisonment for a period of two years. We affirm.

* * *

Candelario and Daniel Guerrero, brothers living in San Antonio, Texas, were charged with violating the United States narcotics laws. They retained Hunt, a San Antonio attorney, to represent them. On May 2, 1966, at the preliminary hearing before the United States Commissioner, Hunt learned the identity of the informer who had gathered the evidence to be used against the Guerrero brothers. He subpoenaed the informer, Paul Leyva, but neither side called him as a witness before the Commissioner. About noon the next day, Leyva was lured to a bar and beaten by several men, one of whom told him "I kill stoolpigeons." After Leyva had been pistol-whipped, hit in the mouth, kicked in the side, shot at and otherwise brutally treated, someone called "Lawyer Hunt". Hunt came, saw Leyva, and questioned him about the case against Daniel Guerrero. The police arrived, as a result of a report of a shooting. Hunt went into the bar and sat at a table with his secretary. The co-defendants and alleged conspirators dragged Leyva to the house next door where they kept guns trained on him. Leyva was then taken to another house where his life again was threatened. In a short while the conspirators telephoned Hunt who came to the house. The others left Hunt and his secretary alone with Leyva. According to Leyva's testimony, Hunt offered to make a deal with him. The three went to Hunt's office. There Hunt dictated a statement for Leyva to sign. During the time he was at the office Leyva had to be shaken to remain conscious. Some seven hours after the beating, Hunt finally took Leyva to a doctor and then to the hospital where he remained for three or four days.

I.

The first issue raised on appeal is whether there was sufficient evidence to support the jury's verdict. The appellant concedes that the jury properly could have inferred

that there existed an antecedent conspiracy to obtain by coercion a statement from Leyva. Hunt argues, however, that there was insufficient evidence, because Leyva was not a witness within the meaning of 18 U.S.C.A. §1503 since there was no proceeding before a court of the United States against Guerrero in which Leyva could have been a witness.

This argument is without merit. This Court defines a "witness" as one who "knows or is supposed to know material facts, and is expected to testify to them, or to be called on to testify . . . as a witness." *Odom* v. *United States,* 5 Cir. 1941, 116 F.2d 996, reversed on other grounds, 313 U.S. 544. Accord: *United States* v. *Grunewall,* 2 Cir. 1956, 233 F.2d 556, reversed on other grounds, 353 U.S. 391; *Smith* v. *United States,* 8 Cir. 1921, 274 Fed. 351; *United States* v. *Pelstein,* 3 Cir. 1942, 126 F.2d 789, cert. denied, 316 U.S. 678.

It is clear that Leyva knew material facts and that as an informer he had given his information to the Government and expected to testify to those facts in the future. The fact that the conspiracy was brought to fruition after the preliminary hearing but before the convening of a grand jury should not relieve Hunt from responsibility for his actions. Section 1503 comes into play at least when a complaint has been filed with a United States Commissioner. *United States* v. *Scoratow,* W.D. Pa. 1956, 137 F. Supp. 620; *United States* v. *Bittinger,* D.C. 1876, 24 Fed. Cas. 1149.

The statute, 18 U.S.C. §1503, is designed to prevent what occurred in this case and to punish those responsible for what happened to Leyva. If any witness ever needed protection of the law, it was Paul Leyva. If any persons ever needed restraint, it was the group who maltreated Paul Leyva.

II.

The second issue the appellant raises is whether the indictment states an offense against the United States. The grand jury indictment begins with the words: "Beginning on or about May 2, 1966 and continuing until on or about May 3, 1966 . . ." Hunt argues that the indictment is defective in that the quoted words mean that the offense began on May 2, 1966 and ended on the same day. We regard this argument as frivolous.

The words in the indictment indicate that the offense charged took place "on or about May 3, 1966." The essentials of a valid indictment are that it be a "plain, concise, and definite written statement of the essential facts constituting the offense charged". R.Fed.Cr.P. 7(c). The indictment here meets this standard. It charges a conspiracy, sets out the dates within which the conspiracy was formed, recites the names of the conspirators, and alleges jurisdiction and venue, the objects of the conspiracy and various overt acts. It goes further and recites the facts and circumstances giving rise to the conspiracy. By any standard, the indictment is sufficient to enable the appellant to know what he is charged with, to prepare his defense, and to plead jeopardy in the event of subsequent convictions for the same offense.

III.

The appellant contends that the trial court's charge did not apprise the jury of the elements of the offense in that the court did not require in his charge that the jury find that the conspiracy continued during and into May 3, 1966. Again the appellant ignores the words "on or about." The court charged that in order to convict it was necessary to decide that the conspiracy came into existence "on or about May 2, 1966." This language includes May 3, when the

overt acts were alleged to have occurred, and which as the jury found, did occur on that date.

IV.

In the district court and on appeal Hunt challenged the petit jury panel on two grounds. First, he contends that the jury commissioner and the clerk violated the federal statutory scheme for jury selection by adding the additional qualification that prospective jurors be "esteemed" in their respective communities. Second, he contends that the jury panel from which his jury was drawn did not represent a fair cross-section of the community in that Mexican-Americans were underrepresented and higher socio-economic groups overrepresented. After conducting a three-day hearing, the district court, in a carefully considered, detailed opinion, overruled the defendant's motion to quash the jury panel.

The trial court found that the alleged additional qualifications sought to achieve constitutionally qualified jurors as recommended by the Judicial Conference of the United States. The so-called "jury suggestor" letter, on which the defendant relies, does not purport to authorize discretionary or impermissible judgment on the part of jury suggestors. In *Rabinowitz* v. *United States*, 5 Cir. 1966, 366 F.2d 34, the Court held that 28 U.S.C. §1861, as amended by the Civil Rights Act of 1957, established uniform, not minimum, standards of federal juror qualifications. But in that case we concluded that the evidence showed that the jury commissioner and the clerk exercised their discretion in selecting jurors according to higher standards than those set in Section 1861. They had their "own ideas" as to "good character, intelligence and ability to 'understand the cases that are tried in court' ". Here the district court found: The jury commissioner and the clerk had not "added on to the statutory qualifications . . . They merely used a

form [of questionnaire] suggested by the Judicial Conference Jury Committee. [See 26 Fed. Rules Dec. 411-459.]" It should be noted the letter to the "jury suggestors" requests that "they make a conscious effort to include both men and women from a variety of backgrounds and occupations so as to give . . . a representative cross-section of your community." In *Brooks* v. *Beto*, 5 Cir. 1966, 366 F.2d 1, one of the cases heard en banc with *Rabinowitz*, this Court approved the use of properly chosen key men or jury suggestors.

The evidence at the hearing showed that Mexican-Americans constituted 17.5 per cent of the jury pool and 11 per cent of the jury panel from which the defendant's jury was drawn. Mexican-Americans constitute about 35 per cent of the population of Bexar County, where San Antonio is located.[1]

The district court found that no discrimination has ever been exercised in the division with regard to race, religion, national origin, or economic status. No name of a juror has ever been rejected for reasons of lack of character, esteem, or bad judgment. The Clerk had made deliberate efforts to obtain names of Mexican-Americans for the jury box. The Jury Commissioner invited leaders of the Mexican-American Community into his home and solicited their help in obtaining names of Mexican-Americans for the jury box. He fully understood his duty in this respect, and conscientiously sought to carry it out. He made no effort to exclude or discriminate against any segment of the com-

1. The San Antonio Division consists of 14 counties. The population of Bexar County constitutes around 75 per cent of the population of the division. The jury panel for this case contained jurors in varying numbers from 13 of the counties. The defendant does not contend that there was any disproportion between the number of members on the panel from Bexar County and the number from the other counties. The abuse of jurors from one county was due to the practice of random drawing.

munity. The trial judge instructed him to obtain jurors from a cross-section of the community. The Commissioner understood that this would include persons with Spanish surnames, and persons of high, low, and middle economic status.[2] He sought names from labor officials in order to help balance out the socio-economic groups.

In *Swain* v. *State of Alabama*, 1964, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, the Court stated: "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%." Here the Court found:

> "If the six-year school standard is used, the variance between that per cent and the per cent eligible would be 4.4 per cent. If the five-year school standard is used, the variance would be 6.5 per cent. In *Swain* the Court stated: 'But purposeful discrimination may not be assumed or merely asserted.' It is the view and holding of the Court that the difference between 11 per cent and 15.4 per cent and/or 17.5 per cent does not constitute such a disparity as to indicate discrimination as to Mexican-Americans."

On these and other facts, as they appear in the record, the defendant failed to show any pattern of discrimination. Cf. *Labat* v. *Bennett*, 5 Cir. 1966, ... F.2d .....; *Davis* v. *Davis*, 5 Cir. 1966, 361 F.2d 770; *Brooks* v. *Beto*, 5 Cir. 1966, 366 F.2d 1.

In view of the defendant's failure to make out a prima facie case of discrimination, we consider that the trial judge did not abuse judicial discretion in rejecting Hunt's

2. There were three Negroes on the jury, a fact that suggests that the clerk and jury commissioner uses adequate sources for the selection of Negroes for jury service. There are 50,000 Negroes in Bexar County or about 6 per cent of the population. There are no notations as to race in the master jury box.

request that he be permitted to examine earlier jury panel lists.

We agree with the conclusion of the court below: "It clearly appears that seldom has such a vigorous, determined and widespread effort been made to have the jury lists represent a broad spectrum of the community and a fair cross-section thereof as has been made in the San Antonio Division.

The judgment is AFFIRMED.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24601

D. C. Docket No. CR 66-66-SA

HOWARD HUNT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

Judgment

This cause came on to be heard on the ranscript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 19, 1968

Issued as Mandate:

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24601

HOWARD HUNT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Texas

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Before JONES, WISDOM and THORNBERRY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant for leave to file petition for rehearing out of time in the above entitled and numbered cause is hereby GRANTED.

It is also ORDERED that the petition for rehearing filed in the above captioned and numbered cause by appellant be DENIED.